IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR RESPONDENT

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BRIEF OF THE RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

The questions presented for review and which will be discussed in this brief are:

1. Does the introduction of television into a State criminal trial, over the defendant's objection, *per se* violate the due process of law provision of the Fourteenth Amendment?

2. Does petitioner show that the trial court's limited and controlled admission of television during petitioner's trial denied him a fair trial in violation of the Fourteenth Amendment?

3. Does Canon 35 of the Canons of Judicial Ethics of the American Bar Association constitute a rule of trial procedure binding on a State court?

STATEMENT OF THE CASE

Petitioner's statement of the case is considered inadequate. In view of repeated generalizations in petitioner's brief which are not descriptive of the conditions under which some of the proceedings of petitioner's trial were televised, respondent desires to submit the following statement:

The facts and circumstances under which televising of a part of the proceedings were permitted by the trial court are not in dispute. The broad claims and charges made by petitioner in his Bill of Exceptions No. 5 (R. 8-18) were drastically qualified by the trial judge. These qualifications are set forth on pages 18 to 21 of the record. It is particularly significant that petitioner agreed to these qualifications and accepted them (R. 21). Again in petitioner's Bill of Exceptions No. 6 numerous claims and charges were asserted by petitioner's counsel (R. 22-24) which also were drastically qualified by the trial judge (R. 25). Again the petitioner agreed to these qualifications and accepted them (R. 25). Thus, these qualifications of the trial court, accepted and agreed to by petitioner, constitute the facts of how this limited use of television during the trial was conducted. These facts are set forth on pages 19, 20 and 21 of the record and again on page 25 of the record. Summarized they show:

The hearing held on September 24 and 25, 1962, to determine whether telecasting, broadcasting and press photography would be permitted took place in part in the absence of the defendant and before the cause was called for trial (R. 21). This was telecast live. Follow-

ing the call of the case, the jury venire was called, sworn and continued (R. 57). The cause was passed for absent witnesses (R. 123).

No evidence or arguments were adduced at the September 24 and 25 hearing concerning the merits of the case. On October 22, Mr. Hume Cofer, attorney for petitioner, testified that the prospective jurors could not have learned anything ". . . about the facts, nor any of the evidence" of the case from the prior live televising (R. 63).

The use of live telecasting, radio broadcasting and press photography that obtained during the hearing on "petitioner's motion not to allow telecasting, broadcasting and press photography" and his motion for continuance, was not permitted to the same extent when the actual trial began a month later (R. 19-21).

Prior to the trial, a booth was constructed in the rear of the courtroom, painted the same or near the same color as the courtroom, with a small opening across the top of the booth for the use of cameras (R. 19).

Live telecasting was not permitted prior to the return of the verdict except for arguments to the jury by state's counsel, and the only other telecasting was on film without sound. Live broadcasting of the trial by radio was not permitted (R. 25).

The telecasting on film was not a continuous operation but was done only at intervals for use on newscasts (R. 20).

Only noiseless cameras were permitted by the court. Floodlights and flashbulbs were not allowed in the courtroom. Telecasting or photographing in the hallways leading into the courtroom or on the floor where the courtroom was situated were not permitted (R. 20).

The court permitted live telecasting only of the arguments of state's counsel. The arguments of petitioner's attorneys were not telecast or broadcast in line with their request (R. 20).

There was no televising at any time during the trial except from the booth in the rear of the courtroom. There was no radio broadcasting equipment in the courtroom at any time (R. 20).

There was no request by any witness that he not be televised while testifying (R. 21).

There was no request by any juror either while being interrogated on voir dire or at any other time that he not be televised (R. 21). Live radio broadcasting or television was not permitted during the voir dire of the jury or during the taking of any testimony (R. 25).

Petitioner did not take the stand to testify in his own behalf. Petitioner called no witness to testify on his behalf (R. 137).

In accordance with the requirements of Texas statutes the jury was kept together throughout the trial and permitted no contact with the outside world. When not in the courtroom or partaking of meals, the jury was locked up.

SUMMARY OF ARGUMENT

In presenting its summary of argument respondent cannot improve upon the interpretation and effect the American Bar Association itself gave to its Canon of Judicial Ethics 35 when amended in its present form at the mid-winter meeting of the House of Delegates of the American Bar Association in 1963. This was the last time that the American Bar Association, through its House of Delegates, officially dealt with Canon 35.

By resolution adopted by the House of Delegates on February 5, 1968, the American Bar Association solemnly declared that the purpose and objective of Canon 35, along with the other canons of judicial ethics

> ". . . constitute the standards of policy recommended by the American Bar Association for the consideration and *voluntary*[1] guidance of the rule-making authorities of the *states* of the United States, and have the force of law only where *voluntarily* adopted and incorporated *in state laws* or as a rule of court. We recommend that the rule-making authority of each *state* exercise the *exclusive responsibility* of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts.'"[2]

The use of television in the courtroom is not *per se* a violation of the rights guaranteed a defendant under the Fourteenth Amendment. Television could be so used as to affect the defendant's rights to a fair trial. Similarly, the conduct of spectators or that of members of the press could be such as to violate these rights.

To equate Canon 35 with the due process clause of the Fourteenth Amendment would lead to a series of legal absurdities.

The limited use of television under close supervision and direction of the court, with cameras in the back of the courtroom in a booth and hidden from view, with no operating sounds to be heard or seen, did not adversely affect petitioner's right to a fair trial.

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[1]Emphasis and parentheses are respondent's unless otherwise indicated.

[2]88 A.B.A. Rep. 118 (1963).

There is no showing that the use of television during the trial of petitioner precluded him from having a fair trial and in absence of such a showing, petitioner's claim of denial of due process of the law must fail.

The answer to the problem of televising trials lies not in barring all television cameras from the courtroom, rather the answer lies in the same judicious and sensible rule now applied to trials covered by the press and open to spectators. In instances where the rights of the accused could be affected by the presence either of television, radio, the press or spectators, the court should take such action as will accord the defendant due process.

The procedure of a State court does not violate the Fourteenth Amendment "because another method may seem fairer or wiser or give a surer promise of protection to a prisoner".

The public not only has the right to know, it should know what goes on in the courtroom. Television cameras used in the courtroom under the same limitations as were prescribed by the court in the case at bar enlighten and educate the public and comport with "the demands of a democratic society that the public should know what goes on in courts."

ARGUMENT

I. THE TELEVISING OF A PART OF A CRIMINAL TRIAL DOES NOT CONSTITUTE *PER SE* A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

The American Bar Association, when it last considered and amended Canon 35, regarded this Canon as no more than a recommendation for the voluntary guidance of the rule-making authorities of the states.

The claims and contentions now asserted in petitioner's brief[3] and more particularly in the brief of *amicus* American Bar Association are strikingly different from the sound approach declared by the American Bar Association House of Delegates,[4] on the recommendation of its Special Committee on Canon 35 on the last occasion Canon 35 was officially considered by the American Bar Association. At that session—the mid-year meeting of the American Bar Association in 1963—Canon 35 received its last amending. Immediately following the passage of Canon 35 in its present amended form, the House of Delegates discussed and passed the resolution set out below. Both the distinguished gentlemen who constituted this Committee and the House of Delegates of the American Bar Association—the governing body—then recognized as sound the very principles for which respondent here contends. The resolution will be quoted in full, inasmuch as neither the petitioner's brief nor that of *amicus* American Bar Association gives it any recognition:

> "The Canons of Professional Ethics and the Canons of Judicial Ethics, as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for the consideration and *voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court.* We recommend that the rule-making authority of each state exer-

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[3]Petitioner gives credit to distinguished members of the American Bar Association's Special Committee on Canon 35 for assistance in the preparation of petitioner's brief. See, for instance, footnote 17 of petitioner's brief.

[4]We are told in the brief of *amicus* American Bar Association that the House of Delegates is the governing body of the American Bar Association. See footnote, page 3, brief of *amicus* American Bar Association.

cise the *exclusive responsibility* of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts." 88 A.B.A. Rep. 118 (1963).

After approving and adopting this resolution the House of Delegates noted that this Special Committee, "its business being completed, was then discharged by vote of the House."[5]

What the American Bar Association officially decided in February of 1963 (after the trial of the case at bar) and what it is contending for in its *amicus* brief is in striking discord, to say the least. Respondent respectfully submits that the Association's official recognition that Canon 35 existed solely "for the *voluntary* guidance of the rule-making authorities of the states" is right; that the Association's official recognition that Canon 35 should have "the force of law only where *voluntarily* adopted and incorporated in *state* laws or as a rule of court" is right; that the Association's official view that the state should exercise "the exclusive responsibility" as to this Canon is right; that the contention of eminent counsel for *amicus curiae* American Bar Association that Canon 35 constitutes fundamental constitutional requirements is wrong.

The Evolution of the Present Judicial Canon 35

The American Bar Association's original Canon 35 was adopted on September 30, 1937, by the House of Delegates. It provided:

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[5]See Official Report, proceedings of House of Delegates, 1963 mid-year meeting, 88 A.B.A. Rep. 118.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." 62 A.B.A. Rep. 1134-35 (1937).

Let it be noted that this Canon stresses the dignity and decorum with which court proceedings are to be conducted. It points out that the taking of photographs and the broadcasting of court proceedings are calculated (1) to detract from the "essential *dignity* of the proceedings," (2) "degrade the court" and (3) "create misconceptions with respect thereto in the mind of the public".

This Canon remained unchanged for 15 years. It is significant to observe that throughout this 15 year period of the existence of the original Canon 35 the American Bar Association believed that the evil of photographing and broadcasting of court proceedings consisted of (a) its indignity, (b) its degrading of the court and (c) in the "misconceptions with respect thereto in the mind of the public". Over these 15 years it had not been contended by the learned gentlemen serving the American Bar Association Committees and its House of Delegates that the photographing and broadcasting of court proceedings in a criminal case would result in the denial of a fair trial.

The first amendment to Canon 35 came in 1952—15 years after the original adoption of the Canon. It specifically included "televising" as being undignified, along with photographing and broadcasting, and emphasized that such proceedings were degrading to the court. For the first time the amended Canon suggested

that the taking of photographs and the broadcasting or televising of court proceedings are *calculated* "to detract the witness in giving his testimony" but it is clear that the emphasis still remained on the indignity of the proceedings and its degrading nature. Unfairness to the defendant was not mentioned.

The last amendment to Canon 35 was promulgated *after* the case at bar was tried. It represents the ultimate its sponsors could conceive to be evil in photography, broadcasting and televising. It was adopted after televising of court proceedings had been tried and tested. This second amended Canon still emphasizes the chief complaint to be that such proceedings are undignified. What is of paramount significance however is that this last amended Canon abandons the claim that photography, broadcasting and televising "degrade the court". Thus, after experimenting with its Canon from 1937 to 1963—a period of 26 years—the American Bar Association realized and admitted its error and conceded that photography, broadcasting and televising were not degrading to the court. But the architects of the last amendment, in an effort to give the Canon more far reaching effect, declared that the taking of photographs in the courtroom and the broadcasting or televising of court proceedings "distract participants and witnesses in giving testimony". This amendment is only two years old. After the passage of a little time and after a period of unbiased and unemotional observation, this last amendment may well meet the fate of the solemn declaration, oft-repeated for 26 years, that photography, broacasting and televising proceedings were degrading to the court.

The stature of Canon 35 is not enhanced by its declaration that the televising of court proceedings "create misconceptions with respect thereto in the mind of,

the public". What misconceptions? By bringing to the public an accurate portrayal of what goes on in the courtroom?

Canon 35, as is so clearly demonstrated by its history, was designed to preserve dignity and decorum in the courtroom. Whatever has been added to buttress it is mostly window dressing. That the dignity of a court proceeding should be at all times observed and preserved is readily conceded. It is also conceded that the manner and method of televising such proceedings could become quite undignified. But it is denied that the mere presence of a camera, unobtrusively located, recording silently some of the proceedings, necessarily results in an undignified trial. It is denied with even greater conviction that such an event *ipso facto* denies a defendant a fair trial.

Notwithstanding efforts to undergird Canon 35 with two amendments, neither the Committee authors nor the House of Delegates adopting it have made the bold claim that *any* act of televising in the courtroom over the objection of the accused *per se* constitutes a denial of due process. Yet this is the present claim of petitioner and *amicus* American Bar Association. To carry this contention to its logical conclusion would mean the end of our present system of public trials, as is demonstrated elsewhere in this brief.

What petitioner and *amicus* American Bar Association are in effect seeking is the inclusion of Judicial Canon 35 in the United States Constitution. They are not content to let it remain a Canon of Ethics; they aspire to exalt it to the status of a constitutional amendment. They do not heed the admonition of Mr. Justice Sutherland in *W. B. Worthen v. Thomas,* 292 U.S. 426, 435 (1934), "The power of this court is not to amend but only to expound the Constitution as an agency of

the sovereign people who made it and who alone have authority to alter or unmake it."

The Absurdities That Follow if Canon 35 is to be Equated with the Fourteenth Amendment

Petitioner and *amici* who side with him take the unequivocal position that any violation of Canon 35, no matter how slight, deprives the defendant of his constitutional rights to a fair trial.* Presumably they are driven to this position as there is nothing in the record to show that any witness or participant was disturbed or distracted by the televising that occurred in the case at bar. There is nothing in the record to disclose that the fairness of the defendant's trial was affected in the slightest, unless it is to be *presumed* that the very act of televising denied him a fair trial. For such a rule to be adopted would give rise to a series of absurdities, some of which we will note.

Canon 35 draws no distinction between photography, broadcasting and televising. It condemns all three activities in the same manner and to the same degree.

If this Honorable Court embraces the rule here contended for by petitioner and the *amici* who side with him, to be consistent it will have to hold that a denial of fair trial has resulted in each of the following situations:

1. A photographer in the rear of the courtroom with a small camera unnoticed by the judge, court attendants, witnesses or participants takes a few shots of the proceedings during the trial. The defendant is

*See for instance, the argument of *amicus* American Bar Association under point III, page 23 of its brief, where it is asserted that Judicial Canon 35 reflects a constitutional requirement stemming from the fair trial guarantee of the Fourteenth Amendment.

convicted. On motion for a new trial he produces proof of the taking of these pictures. Has he been denied a fair trial and is he entitled to a new trial? Under the urging of *amicus* American Bar Association he has indeed been denied a fair trial because it argues that Canon 35 reflects a fundamental constitutional requirement[7] and Canon 35 condemns the "taking of photographs in the courtroom, during sessions of the court".

2. The Canon similarly condemns the taking of photographs during "recesses between sessions" because they detract from the dignity of the proceedings and "distract participants and witnesses in giving testimony". During a recess a witness on the stand leaves the courtroom and walks to the water fountain. While drinking from the fountain the photographer takes a picture without flash which may or may not have been noticed by the witness. The defendant is convicted. Is he entitled to a new trial? If not, what becomes of the American Bar Association argument that this Canon reflects a fundamental constitutional requirement, one of which is that no photographs be taken during recess?

3. The court permits the broadcasting of his charge to the jury by use of a microphone either in plain view or hidden from view. Canon 35 condemns it. Under the contention of the American Bar Association, if consistency is to be observed, the defendant upon conviction is entitled to a new trial. It is inconceivable to us how this act of broadcasting of the charge to the jury affected the fairness of his trial.

4. A camera in the rear of the courtroom hidden from view televises only the taking of the oath of each witness as he takes the stand. Canon 35 condemns it. Under the American Bar Association argument the de-

[7] A.B.A. brief, p. 23.

fendant's constitutional rights have been violated. But just how this affected the fairness of the defendant's trial is quite unclear to us.

These illustrations can be multiplied. They are submitted not to ridicule but to point up the fallacy in the contention that any act of photography or broadcasting or televising in violation fo Canon 35 *ipso facto* transgresses the defendant's constitutional rights. Therein lies the weakness of petitioner's contention. There is not the slightest showing that the partial televising of petitioner's trial resulted in any actual denial of due process. The court is being asked to presume something that did not exist.

The problem can only be resolved by a requirement that before relief is granted the circumstances of the acts of photography or broadcasting or televising must be such as to have in fact rendered the trial unfair.[8] Otherwise the application of the Fourteenth Amendment to televised court proceedings will produce farcical results.

Alleged Distractions to Witnesses and Participants

That the mere recording of testimony and its dissemination to the public constitutes a "distraction" to a witness, a defendant or to counsel furnishes no valid support to barring the television camera. Most court proceedings are now recorded by the official court reporter using a machine which records the voice of witness, counsel and judge and is operated in their plain view. In former days, a court reporter seated directly in front of the witness recorded his testimony

[8] "'[B]ut fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." Mr. Justice Cardozo—*Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934).

in shorthand. Both methods are used in many courtrooms. Under either method, the news media can buy this testimony from the court reporter and make it public. Is this a psychological distraction to the witness? Is this an embarrassment to the defendant affecting his rights under the Fourteenth Amendment? Is this an annoyance to a supersensitive counsel? This recording machine, in plain view of witness, defendant and counsel, is much more noticeable than was the silent, obscured TV cameras in the back of the courtroom during the trial of the case at bar.

The "distraction" argument, if it is to be applied consistently, would mean an end to all news coverage of trials. A trial of great public interest may draw a dozen or more members of the press. Seated at a special table with pencils poised in hand, they concentrate on every word of the witness' testimony and busily record it. Who is there to say that this is a lesser "distraction" than the hidden TV camera in the rear of the courtroom?

The presence of rows of spectators in the courtroom with eyes glued on the witness undoubtedly provide some "distraction". To many defendants the presence of spectators is embarrassing. These conditions are not ideal from the standpoint of providing a perfect setting for the defendant, but is it to be decreed that our entire interest in the administration of justice is to be centered on the defendant?

If all distractions to witnesses and participants are to be removed to assure a "fair trial", public trials are doomed. For so long as trials are to be open to the public and the press—there will be some inevitable distractions. But is this not a lesser evil than the oppression that will follow when trials are privately held? For as Mr. Justice Sutherland pointed out—"To allow

it (the press) to be fettered is to fetter ourselves." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

II. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Petitioner makes no showing of denial of due process of law.

The burden is on the petitioner to show such prejudice or partiality in the trial as to "necessarily prevent a fair trial". *Lisenba v. California,* 314 U.S. 219, 236 (1941); *Beck v. Washington,* 369 U.S. 541 (1962). As Mr. Justice Holmes concluded, in a case wherein some jurors actually had read news articles of the case during the trial, "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day." *Holt v. United States,* 218 U.S. 245, 251 (1910).

The briefs of petitioner and *amici* who take his side literally teem with claims of adverse psychological effect television has on witness and participant. The genuine psychologists still are to be heard from. The views so far expressed are merely the opinions of men untrained in this scientific field. But, this Honorable Court is not dealing in hypothetical situations, rather it has before it a factual situation bearing no reasonable resemblance to the assumptions engaged in by petitioner.

The record clearly discloses (in fact, petitioner agreed to the facts stated in the qualification of the Presiding Judge to petitioner's Bills of Exception, R. 18-21, 25) that, far from commotion and disturb-

ance, confusion and annoyance, the partial televising of the trial was conducted under these circumstances:

(1) The cameras were in a remote place in the rear of the courtroom, hidden from view of those in attendance at the trial.

(2) The defendant offered no testimony, thus there could have been no distraction of the defendant or defendant's witness.

(3) The defendant's counsel preferred to make his argument to the jury without being televised and his request was granted.

(4) Telecasting only on film *without sound* was permitted except at the time the state's counsel made his argument to the jury, the return of the verdict by the jury and its acceptance by the court, which were telecast with sound.

There is not the slightest showing in the record that any witness was inhibited or that any juror was affected by this televising, nor was there any showing that the defendant was prevented from the full opportunities of a fair trial by the presence of the hidden TV cameras which recorded only a part of the proceeding. The court is asked to *presume* as a matter of law that the defendant's rights were adversely affected. This not only is a novel approach to the question of a fair trial—it is a dangerous one.

The procedure of a State Court does not violate the Fourteenth Amendment "because another method may seem fairer or wiser or give a surer promise of protection to a prisoner".

In *Snyder v. Massachusetts,* 291 U.S. 97 (1934), the State of Massachusetts approved the practice of permitting a jury to view the scene of the crime in the

absence of the defendant. This the defendant contended denied him due process. This Honorable Court rejected the contention and held:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. * * * Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." 291 U.S. at 105.

This holding was reviewed in *Leland v. Oregon*, 343 U.S. 790 (1952). Oregon law provided that "morbid propensity" to commit a crime was no defense and the burden was cast on the defendant to prove his defense of insanity "beyond a reasonable doubt". The court, speaking through Mr. Justice Clark, held:

> "Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. In Davis v. United States (US) supra, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' Snyder v. Massachusetts, supra (291 US at 105, 78 L ed 677, 54 S Ct 330, 90 ALR 575). 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the

judgment of the state court under review.' Mr. Justice Frankfurter, concurring in Malinski v. New York, 324 US 401, 417, 89 L ed 1029, 1039, 65 S Ct 781 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." 343 U.S. at 798-799.

As pointed out, supra, in 1963 *amici* American Bar Association recognized the wisdom of this rule of law when it forthrightly declared by resolution adopted by its House of Delegates that Canon 35 was merely recommended "for the consideration and voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court".[9]

The jurisprudence of our land will be best served, respondent submits, by this Honorable Court following the action of the House of Delegates, carefully and studiously taken at its mid-year session in 1963, instead of adopting the extreme rule called for in the Association's amicus curiae brief—that Canon 35 reflects a "constitutional requirement".

The established rule of procedure in Texas has always been that it is within the sound discretion of the trial judge to determine whether television or photography of a trial or any part thereof would be permitted. This rule of procedure recognizes that each factual situation must rest on its own bottom. As to whether such televising or photography has in fact denied the defendant due process of law must be determined by an examination of the facts of the case—just as it

[9] 88 A.B.A. Rep. 118 (1963).

would be done if unruly spectators interrupted the trial or members of the press engaged in conduct alleged to be prejudicial to the defendant's rights.

The Fair and Reasonable Approach to Courtroom Televising

Respondent detects an unmistakable hysteria in the clamor to ban all televising of court proceedings as required by Judicial Canon 35 which means, for instance, that not even one scene could be recorded by a camera that is completely hidden from view without violating the accused's constitutional rights. It would mean that in cases of pleas of guilty where neither witness nor accused testifies the camera would still be banned. And on what ground? That it is "undignified"? Is the Fourteenth Amendment to be stretched and tortured to make it applicable to an "undignified" event in the courtroom? Is this not carrying the due process contention—the "fair trial" argument—to an absurdity? The answer lies in the warning of Mr. Justice Holmes, "I cannot believe that the (Fourteenth) Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri,* 281 U.S. 586, 595 (1930). Here the petitioner and *amici* seek to embody in the Fourteenth Amendment the "ethical" beliefs of a bar association.

We respectfully suggest that the fair and reasonable approach to this problem is not one of letting the pendulum swing to an absurd and dangerous arc. The approach should be independent of emotional and imaginary fears. Fair to the defendant, it should not be unfair to the public and the news media. Loud and demanding cries for reform need to be viewed with particular care, lest a result be reached which as Mr.

Justice Story described it, made "shipwrecks of the law".[10]

The answer to the problem of televising trials lies not in barring all cameras from the courtroom. It lies not in making Canon 35 sacrosanct to the point of holding that the mere transmission of one scene by the TV camera in the courtroom without the consent of the accused renders the proceeding *ipso facto* unconstitutional. Rather the answer lies in the same judicious, sensible rule now applied to trials covered by the press and open to spectators. Members of the press could be guilty of conduct during the trial that would keep the defendant from having a fair trial. If this occurred, the court should take appropriate steps to guarantee a fair trial. Spectators could so demean themselves as to keep the defendant from having a fair trial. If this occurred, the defendant should be accorded the protection of the court to assure a fair trial. But to unqualifiedly say that because the press or spectators, as the case may be, *could* be guilty of conduct that denied the accused due process of law is grounds for excluding them from the trial is poor argument indeed. By the same yardstick, simply because television *could* create conditions denying the accused due process of law is poor argument for excluding it from all criminal trials on constitutional grounds.

In the final analysis, the responsibility for assuring the accused a fair trial remains with the presiding Judge. It is his responsibility to keep the press under reasonable control, to keep spectators under reasonable control and similarly he should exercise the responsibility of keeping television efforts under appropriate control.

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[10]Story: Misc. Writings, 283.

III. THE PUBLIC NOT ONLY HAS THE RIGHT TO KNOW—IT SHOULD KNOW WHAT GOES ON IN OUR COURTS

In *Maryland v. Baltimore Radio Show,* 338 U.S. 912 (1950), this Honorable Court declared:

> "... One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. * * *" 338 U.S. at 920.

If the public should know what goes on in our courts —as this Honorable Court has said it should—then how much better, clearer and more accurately can it be told by television than by any other media.

Respondent does not find it necessary to contend that the provisions of the Sixth Amendment guaranteeing a public trial are for the benefit of the public but respondent does assert that proceedings in the courtroom are public property.

In *Craig v. Harney,* 331 U.S. 367 (1947), this Honorable Court pointedly said: "What transpires in the courtroom is public property." 331 U.S. at 374. The court further noted that

> "... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in in proceedings before it." 331 U.S. at 374.

In *Re Oliver,* 333 U.S. 257 (1948), this court emphasized:

> "... Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has

always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. *The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . .*" 333 U.S. at 270.

Mr. Justice Brennan in *Levine v. United States,* 362 U.S. 610 (1960), in a dissenting opinion joined in by Mr. Justice Douglas, observed that "The special interest of the public in the publicity of adjudications of guilt of crime has been repeatedly pointed out judicially." 362 U.S. at 626. Indeed the public does have a special interest in such publicity and when this interest ceases the administration of justice is sure to suffer.

It was stated by this Court in *Pennekamp v. Florida,* 328 U.S. 331 (1946), that:

> "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct." 328 U.S. at 346.

Respondent is aware of the views expressed by Mr. Justice Douglas which are reproduced in the American Bar Association Journal of August 1960.[11] After noting that "What transpires in the courtroom is, of course, public property in the sense that what happens may be reported and discussed", Mr. Justice Douglas stated that "the historic concept of a public trial envisaged a small close gathering, not a city-wide, statewide or nation-wide arena". If this means that it is

[11] 46 A.B.A.J. 840, 842.

considered preferable to the administration of justice for only a small number instead of many to witness our court trials, respondent respectfully and with deference disagrees.

Although respondent regards it unnecessary to this case to engage in a discussion of the pros and cons of the desirability of televising court proceedings, we cannot refrain from pointing out that the advent of television provided the first opportunity for the public at large to know what transpires in the courtroom. Heretofore, the limitations on seating capacity reduced this opportunity. Far from viewing a trial as a spectacle, the solemnity, dignity and fairness of a properly conducted trial would prove enlightening to the public and promote a greater respect for our courts. Respondent readily admits that a poorly conducted trial would have the opposite effect, but there the evil rests not with television but with the failure of the Bench and Bar to keep their house in order.

Of all of the media of information, none portrays the courtroom scene, the spoken word and the appearance of the participants so accurately as the television camera. There is no chance for mistake or erroneous interpretation. Still, paradoxically, the American Bar Association's Canon 35 refers to such a transmission of information as creating "misconceptions * * * in the mind of the public".

Two well-reasoned cases by State Courts which discuss and discard the various arguments advanced by petitioner and *amici* who take his side are: *Lyles v. State*, 330 P. 2d 734 (Okla. Cr., 1958); *In Re Hearings Concerning Canon 35*, 296 P. 2d 465 (S. Ct., Colo., 1956). We commend them for the consideration of this Honorable Court.

Television's Alleged Influence on Jurors

Pages 12 and 13 of the *amicus curiae* brief of the American Bar Association are devoted to a hypothetical discussion of the impact of television on jurors. The brief discussses the influence of a wife on her juror husband, the impact of witnessing repeated trial episodes on the television screen and other supposedly inhibiting effects produced by jurors looking at themselves on the television screen. But this is purely an academic discussion. Under the laws of Texas, the jurors in the case at bar were required to be locked up together and excluded from outsiders. (Articles 623, 668, 670 and 671, Code of Criminal Procedure of Texas.)[12]

In response to Petitioner's argument Respondent has obtained the affidavit of each juror in the case at bar and has furnished a copy of same to counsel for Petitioner. These affidavits are available should the Court desire to know the impressions that were produced on the minds of the jurors in this case because of the presence of the cameras in the courtroom and are hereby tendered to the Court.

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[12]Articles Appear In Appendix.

CONCLUSION

It is respectfully submitted, for the reasons stated above, that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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APPENDIX

The following four articles are from the Code of Criminal Procedure of Texas:

Art. 623. 699, 680 Jurors shall not separate

"The Court may adjourn veniremen to any day of the term. In felony cases when jurors have been sworn in a case, those so sworn shall be kept together and not permitted to separate until a verdict has been rendered or the jury finally discharged; provided, however, that when such jurors are kept overnight, facilities shall be provided for female jurors separate and apart from the facilities provided for male jurors, and such juries shall be permitted to separate to the extent of housing female jurors separate and apart from the male jurors."

Art. 668. 745, 725 Separation of jury

"After the jury has been sworn and impaneled to try any felony case, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer."

Art. 670. 747, 727 To provide jury room

"The sheriff shall provide a suitable room for the deliberation of the jury and supply them with such necessary food and lodging as he can obtain. No intoxicating liquor shall be furnished them. In all cases wherein a jury consists partly of male jurors and partly of female jurors, the sheriff shall provide facilities for the female jurors separate and apart from the facilities provided for the male jurors."

Art. 671. 748, 728 Conversing with jury

"No person shall be permitted to be with a jury while they are deliberating upon a case, nor be permitted to converse with a juror after he has been impaneled, except in the presence and by the permission of the court, or except in a case of misdemeanor where the jury have been permitted by the court to separate. No person shall be permitted to converse with the juror about the case on trial."